STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 19, 2007
v	No. 267645 Kent Circuit Court
LAMONT WIGFALL, Defendant-Appellant.	LC No. 04-006363-FH

Before: Kelly, P.J. and Markey and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of assault with a dangerous weapon, MCL 750.82, two counts of malicious destruction of police property, MCL 750.377b, and receiving and concealing stolen property valued at $20,000 or more, MCL 750.535(2)(a). The trial court sentenced defendant as a habitual offender third offense, MCL 769.11, to concurrent sentences of 2 ½ to 8 years in prison for the first five counts and 4 to 20 years in prison for the last count. Defendant appeals as of right. We affirm.

Defendant raises three claims of ineffective assistance of counsel. Because defendant did not move for a new trial or a *Ginther*[1] hearing, our review of defendant's claims for ineffective assistance of counsel is limited to mistakes apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). "To establish ineffective assistance of counsel, a defendant must prove that his counsel's performance was deficient and that, under an objective standard of reasonableness, [he] was denied his Sixth Amendment right to counsel." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). A defendant must also prove that his counsel's deficient performance was prejudicial to the extent that, but for counsel's error, the result of the proceedings would have been different. *Id.* A defendant must overcome a strong presumption that his counsel's assistance constituted sound trial strategy. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

Defendant first asserts that counsel was ineffective for raising an alibi defense and then failing to subpoena the witnesses listed on his alibi notice and for failing to request an alibi

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

instruction. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). We will not second guess counsel on matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *Id.* To overcome the presumption that counsel's decision not to call a witness was sound trial strategy, a defendant must show that counsel's decision deprived him of a substantial defense that would have affected the outcome of his trial. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Alibi testimony is "'testimony offered for the sole purpose of placing the defendant elsewhere than at the scene of the crime.'" *People v McGinnis*, 402 Mich 343, 345; 262 NW2d 669 (1978), quoting *People v Watkins*, 54 Mich App 576, 580; 221 NW2d 437 (1974). At trial, defendant testified that he was with Tiffany Killebrew at Killebrew's mother's house at the time of the crimes. Accordingly, defendant presented alibi testimony and an alibi defense. However, the five men listed on defendant's notice of alibi were not actual alibi witnesses. The five men had no knowledge of defendant's whereabouts at the time of the crimes. They could only testify as to Shontay Edwards's alleged confession to the crimes for which defendant was charged. Accordingly, defendant's argument that he received ineffective assistance of counsel because counsel failed to support his alibi defense by not calling his five alibi witnesses is without merit. Defendant has not established that counsel's decision not to call the witnesses listed on his alibi notice deprived him of a substantial defense. *Daniel*, *supra* at 58.

Additionally, upon request, a defendant is entitled to an alibi instruction if he gives alibi testimony. *McGinnis*, *supra* at 345-347. This is true even if defendant's testimony is uncorroborated. *Id.* Nonetheless, the failure to give an alibi instruction is not error requiring reversal if the trial court properly instructed the jury on the elements of the offenses and the prosecutor's burden of proof. *Sabin (On Second Remand)*, *supra* at 660. Thus, if the trial court properly instructs the jury, the absence of an alibi instruction will not have a reasonable probability of affecting the outcome of the trial. *Id.* Defendant does not argue that the trial court failed to properly instruct the jury on the elements of the charged offenses or on the prosecutor's burden of proof. Thus, defendant cannot show that, even if counsel's performance in failing to request an alibi instruction was deficient, but for counsel's deficient performance, the result of the proceedings would have been different. *Mack*, *supra* at 129.

Defendant next asserts that he was denied effective assistance of counsel because counsel failed to request that the "do-rag" worn by the driver of the Expedition be submitted for DNA testing. It is undisputed that defendant's trial counsel did not know of the "do-rag's" existence until after the start of defendant's trial. Defendant argues that counsel's failure to know of the "do-rag's" existence was the result of her failure to make a formal discovery request. While the lower court file does not contain a discovery request made by defense counsel, the record indicates that counsel did, in fact, request discovery. After the prosecutor moved to admit photographs of the damaged police vehicles, counsel objected, arguing that she had made a request for discovery and that the photographs had not been provided timely to her. Further, while discussing defendant's request that the "do-rag" be submitted for DNA testing, counsel, on two occasions, informed the trial court that the prosecution had failed to provide her with complete discovery before the start of defendant's trial. It is, therefore, not apparent from the record that counsel's failure to know of the existence of the "do-rag" was the result of her deficient performance, rather than from the prosecution's failure to provide complete discovery.

Because defendant has not demonstrated that counsel's performance fell below an objective standard of reasonableness, defendant has not established that he is entitled to relief on his claim of ineffective assistance of counsel. *Mack, supra* at 129.

Defendant also asserts that he was denied effective assistance of counsel because counsel elicited testimony from William Wolz, a fingerprint expert, which allowed the jury to infer that defendant had a criminal record. On cross-examination by defense counsel, Wolz testified that 90 to 95 percent of the fingerprints in the AFIS database, the database in which a fingerprint taken from the Expedition was matched to defendant's fingerprints, came from arrest records. "Decisions concerning which witnesses to call, what evidence to present, or the questioning of witnesses are considered part of trial strategy." *People v Bass (On Rehearing)*, 223 Mich App 241, 253; 565 NW2d 897 (1997), vacated in part on other gds 457 Mich 866 (1998). Even if we were to conclude that counsel's cross-examination of Wolz fell below an objective standard of reasonableness where she elicited the challenged testimony, defendant cannot show that, but for counsel's deficient performance, the result of his proceedings would have been different. *Mack, supra* at 129. Defendant, himself, testified that, on May 16, 2004, the day before the crimes occurred, he offered to drive the Expedition while Edwards smoked marijuana. Defendant indicated that he did so because he was on probation and was not supposed to be around Edwards and others. Defendant then testified that he was arrested when he visited his probation officer. Thus, while Wolz's testimony may have allowed the jury to infer that defendant had an arrest record, defendant testified that he, in fact, had a criminal record. Accordingly, defendant has failed to establish that counsel's cross-examination of Wolz denied him effective assistance of counsel.

Defendant finally argues that the trial court, pursuant to MRE 609, erred in allowing the prosecutor to impeach Larry Jones with his pending charges of attempted carjacking and assault with intent to rob while armed. Defendant objected to the challenged cross-examination of Jones, but he argued that the cross-examination was irrelevant, rather than improper impeachment. Because an objection based on one ground is insufficient to preserve an appellate attack based on a different ground, *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993), the issue is unpreserved. We review an unpreserved claim of error for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Under MRE 609, pending charges may not be used to impeach a witness. *People v Hall*, 174 Mich App 686, 690; 436 NW2d 446 (1989). However, MRE 609 does not apply to past arrests that do not result in convictions or pending charges to show a witness's interest in testifying. *People v Layher*, 464 Mich 756, 771; 631 NW2d 281 (2001); *Hall, supra* at 690-691. In this case, the prosecutor did not introduce evidence of Jones's pending charges to impeach Jones's credibility. Rather, the prosecutor introduced evidence of the pending charges to bring out his Jones's interest in testifying on defendant's behalf. Because Edwards had pointed Jones out as the perpetrator of the unrelated attempted carjacking and assault with intent to rob while armed, Jones had a motive for testifying that Edwards, rather than defendant, committed the crimes for which defendant was on trial. Accordingly, the trial court did not plainly err in allowing the prosecutor to cross-examine Jones regarding his pending charges. *Carines, supra* at 763. In addition, because the trial court prohibited the prosecutor from questioning Jones about

the substance of the pending charges, the trial court did not plainly err in allowing the prosecutor to mention the nature of the pending charges. *Id.*

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Michael R. Smolenski